IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 361 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE R.P.DHOLAKIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

PUSHPABEN HARENDRASINGH JADEJA

Versus

STATE OF GUJARAT

Appearance:

MR TS NANAVATI for Petitioner

MR AJ DESAI, ADDL. PUBLIC PROSECUTOR for Respondent No. 1

MR VIKRAM TRIVEDI for MR Y.B. BRAHMABHATT for

MS NIRMALA J JHALA for Respondent No. 2

CORAM : MR.JUSTICE R.P.DHOLAKIA

Date of decision: 16/03/2001

ORAL JUDGEMENT

The present petitioner who is the original complainant of FIR No.I 17/98 has filed this petition

under Section 439(2) of the Code of Criminal Procedure Code, 1973 for cancellation of bail granted to respondent No.2 - Shatrughnasingh @ Sanjaysingh Kalyansingh Yadav by the learned Additional Sessions Judge, Bharuch, vide his order dated 21.12.1998 below application Exhibit 5 in Sessions Case No. 86/98.

The petitioner has prayed for cancellation of the bail granted to respondent No.2 on various grounds. The brief facts of the prosecution case are as under:-

As per the say of the complainant, on 14.1.1998 morning the complainant along with her son and husband went to the house of one Kantibhai Mansukhbhai Patel for watching Television and at that time, upon hearing shouts the complainant saw that all accused were having various weapons in their hand and more particulary, the respondent No.2 was also having a knife in his hand. They assaulted son of the complainant Arjunsinh and the complainant herself. They caused serious injuries to Kishan Chhaganlal Kahar, who succumbed to death. The complainant has therefore, filed a complaint before the Bharuch City "A" Division Police Station naming all the accused persons for the offences punishable under Sections 143, 147, 148, 149, 302, 307, 325 and 120B of the Indian Penal Code.

The Police started investigation and arrested the present respondent No.2 alongwith other accused persons and sent to judicial custody. It has been argued by the learned Counsel for the respondents that while they were in judicial custody, they preferred Criminal Misc. Application No. 60 of 1998, which came to be heard and disposed of by the learned Additional Sessions Judge, Bharuch vide judgement and order dated 6.2.1998, thereby partly allowing the application and refusing bail to the present respondent No.2 and one another accused - namely Kalyansingh Bhagwansingh Yadav. Being aggrieved by the judgement and order dated 6.2.1998, petitioner preferred Criminal Misc. Application No. 589 of 1998 before this Court for cancellation of bail, which is pending. In the meantime, the respondent No.2 and Kalyansingh Yadav who were refused bail also preferred a Criminal Misc. Application No. 171/98 before the Court of learned Sessions Judge at Bharuch and the same came to be rejected by order dated 4.4.1998 passed by the Additional Sessions Judge, Bharuch. Against that order both the above accused filed Criminal Misc. Application No. 2877 of 1998 before this Hon'ble Court inter-alia praying for bail and this Court (Coram : M.H.Kadri,J.) vide order dated 10.8.1998 granted bail to accused Kalyansinh

Bhagvansinh Yadav and the application qua the present respondent No.2 was rejected as withdrawn. Thereafter, he preferred Criminal Misc. Application No. 3879 of 1998 before this Court, and after arguments the learned Counsel for the petitioner sought permission to withdraw the petition and the same has been disposed of as withdrawn by order dated 16.9.1998.

It appears that respondent No.2 herein thereafter filed an application below Ex. 5 in Sessions Case No. 86/98, wherein the learned Additional Sessions Judge, Bharuch granted bail by his order dated 21.12.1998. It is against this order of the learned Additional Sessions Judge that the present application is being filed under Sec. 439(2) of the Code of Criminal Procedure.

I have heard the learned Counsel for the respective parties. The learned Counsel for the petitioner has drawn my attention towards various orders passed by this Court as well as the trial Court. It is established from the records and proceedings which has been shown to me by the learned Counsel for the petitioner that respondent No.2 has filed in all two Criminal Misc. Application in this Court, which has been referred as above and admittedly the last one being Criminal Misc. Application No. 3879 of 1998 also came to be rejected as withdrawn. This Court has disposed of the application vide order dated 16.9.1998 by passing the following order:-

> "This petition has been filed after receiving the charge-sheet. After hearing the learned Advocate for the petitioner at legnth, he seeks permission to withdraw this petition. Permission is granted. This petition stands rejected as withdrawn."

The learned Counsel for the petitioner has argued that after withdrawal of the aforesaid Criminal Misc. Application No. 3879 of 1998, the present respondent No.2 preferred application Ex. 5 in Sessions Case No. 86/98 by suppressing the fact that application for bail preferred by the respondent No.2 before this Court after receiving the charge-sheet was disposed of as withdrawn. The learned Counsel argued that had this been brought to the notice of the learned Additional Sessions Judge, the application for bail would not have been granted because this Court has rejected the bail applicaton of the present respondent No.2 on merits, which has been filed by him after issuing charge-sheet. He has drawn my attention to the orders dated 21.12.1998 passed by the

Court below Exhibit 5 and more particularly paragraph 3 thereof, wherein the Court has come to the conclusion that after reading FIR if complaint is accepted to be true, then also prima-facie it is very difficult to believe the involvement of the present respondent No.2 in the crime in question. It appears that the learned Additional Sessions Judge has decided the application only on the basis of FIR. Here also he has drawn my attention to application Ex.5 and argued that even present respondent No.2 has suppressed the fact regarding rejection of his application by this Court on 16.9.1998 and therefore, the Court below ought not to have granted bail to the respondent accused only on the ground that this Court has refused him bail. This FIR has been tested four to five times by the trial Court as well as this Court. He argued that if at all Court wanted to hear the bail application of the respondent No.2, it ought to have been decided on other grounds and not on the basis of FIR, which has been tested on several occasions and there were no fresh grounds available to the respondent No.2 - original petitioner after the application was rejected by this Court. The learned Counsel for the petitioner has drawn my attention to various judgements of the apex Court and more particularly, decision in case of State of Maharashtra Vs. Captain Budhikota Subha Rao, reported in AIR 1989 (S.C) 2292, wherein it has been held that the order granting bail was not proper and liable to be set aside as judicial discipline, propriety and comity demanded that the order granting bail should not have been passed reversing all earlier orders including the one rendered by the High Court only on a couple of days before, in absence of any substantial change in the fact and situation and in such cases it was necessary to act with restraint and circumspection in order to discourage the practice of filing successive bail applications without change of circumstances.

Learned Counsel for the respondent No.2 argued that the learned Sessions Court has got concurrent jurisdiction and the Court can grant fresh bail at any stage and he has also argued that to grant bail and to cancel bail are two different aspects of the matter and therefore while deciding the application for cancellation of bail, Court should be much more vigilant and other criteria is required to be kept in mind, more particularly the act of the accused who has been released on bail, whether he has misused the liberty or whether he has breached any condition which has been imposed by the Court below. He has also relied upon various judgements of this Court as well as apex Court.

The fact remains that Court below has granted bail to the respondent No.2 only on the basis of FIR and prima-facie he came to the conclusion that even if the contents of the FIR is taken to be true, then also it is difficult to involve the accused in the crime in question and therefore, he is required to be released on bail. However, the learned Additional Sessions Judge has not appreciated that the same point has been decided by this Court twice and this Court has rejected the Criminal Misc. Application No. 3879/98 on 16.9.1998 after going through the charge-sheet and other papers. In this view of the matter, it would be in the fitness of things that the order below Ex. 5 passed by the Court below is required to be set aside, which was passed in the circumstances that the accused suppressed the material facts. Without entering into the merits and demerits of the matter, it is necessary to set aside the order passed by the Court below Ex. 5.

In the result this application is allowed. The order dated 21.12.1998 passed by the Additional Sessions Judge, Bharuch below Ex. 5 in Sessions Case No. 86/99 is quashed and set aside. However, respondent No.2 is at liberty to file fresh application before the Court below, if any fresh ground is available to him, within a period of 20 days from the date of receipt of writ of this order and if the respondent Shatrughnasingh @ Sanjaysingh Kalyansingh Yadav makes such application for obtaining bail, the Court below should decide the same within ten days upon filing such application and during the hearing of such application, the respondent No.2 is directed to remain present in the Court. Rule is made absolute accordingly.

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